United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-1299

To be argued by
Angelo T. Cometa

B
P/S

UNITED STATES COURT OF APPEALS
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

SIDNEY STEIN,

Defendant-Appellant.

On Appeal from an Order of the United States District Court for the Southern District of New York

---

REPLY BRIEF FOR APPELLANT

Phillips, Nizer, Benjamin,
Krim & Ballon
Attorneys for Defendant-Appellant
40 West 57th Street
New York, New York 10019
(212) 977-9700

Of Counsel:
Louis Nizer
Angelo T. Cometa
Perry S. Galler
Jonathan D. Warner

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, :

Appellee, :

-against- : Docket No. 76-1299

SIDNEY STEIN, :

Defendant-Appellant. :

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT

Contrary to the Government's assertion, it is clear that the facts underlying appellant's arguments in this Court were unequivocally addressed to Judge Motley on the original motion to reduce the sentence and the subsequent application to reconsider the denial of the motion. These motions argued that the Court had improperly considered material misinformation in determining the quantum of appellant's

sentence. While appellant stressed that the Court had failed to give him any credit for his extensive cooperation with a multitude of federal agencies (which cooperation the Government readily concedes), appellant also gave to the Court below, full particulars relating to the very misinformation upon which Judge Motley relied.

The sentence minutes and the endorsed memoranda made in denying both motions confirm the fact that the Court expressly relied upon this misinformation in determining the length of appellant's sentence. Moreover, the record confirms that there was no credible basis for this reliance. Under these circumstances, the law is well-settled that this Court has jurisdiction to vacate the unlawful sentence and to remand the case to another District Judge for resentencing.

I

THE DISTRICT COURT WAS EXPRESSLY APPRISED OF THE FACT THAT THE INFORMATION UPON WHICH IT RELIED WAS UNTRUE

One of the most startling conclusions drawn by the Court below at sentencing was that the appellant attempted to exert influence in connection with his earlier sentence before Judge Bryan (A. 52)* Appellant challenged this conclusion

---

*A. Refers to the Appendix

in his motion papers and quoted the statement of Assistant United States Attorney Jerry Feffer which demonstrated that appellant was cooperating completely with the Government in the investigation relating to allegations of an attempt to exert illegal influence. (A. 69, 71)** Appellant's motion also called the Court's attention to the fact that this matter

> was not a situation in which Stein was attempting to "fix a sentence" or engage in further unlawful activity, but, rather, a situation in which he properly reported information concerning an unlawful solicitation, and then agreed to act as an undercover informant so that those responsible for the alleged "influence-peddling" could be properly brought to justice. (A. 71)

In a lengthy footnote in its brief, the Government suggests that Judge Motley may have had some basis for her belief that appellant had tried to fix a case in 1972. While the Government concedes that appellant's testimony upon which the Judge had allegedly relied is not "crystal clear," the fact is that appellant testified that he reported the solicitation to fix the case to the Government and that the Government became aware of his conversations with the solicitors "almost from the beginning." (A. 159) Appellant further testified that his cooperation with the Government in this

---

** Pages 12 and 13 of the motion to reduce appears in the Appendix in inverted order. Page 12 should have been designated A.70 and Page 13, A.71.

matter involved the taping of conversations with the solicitors and that "when the tapes were used, it was under Government supervision authorized by the Courts." (A. 159)

Appellant's motion fully apprised the Court of the fact that this matter had been explored in depth before Judge Bryan at the time appellant moved to reduce the sentence he had received from Judge Bryan. Obviously Judge Bryan did not consider appellant to have committed any impropriety as evidenced by the fact that the Judge reduced the appellant's two-year sentence to time served. Judge Bryan's decision alone should have been sufficient to have disposed of any charge that appellant had acted improperly in this matter. In light of the facts before Judge Motley, and the decision of the very judge whose case appellant allegedly attempted to improperly influence, it was erroneous and unsupportable for the Court to conclude that appellant had attempted to exert such influence in his prior case, and then to consider this conclusion as a factor in imposing sentence.

Similarly, the Court below had before it an extensive discussion of the true circumstances behind appellant's attempted suicide. (A.73-76) The motion papers squarely addressed this issue and called it "the most serious mis-impression left with this Honorable Court." (A.73) These motions describe in detail appellant's long history of emotional and

psychiatric illness and give a chronological account of appellant's mental deterioration and the events leading to his attempted suicide. (A. 73-75) The Court was also apprised of the conclusions of the psychiatrists who examined appellant at Springfield following his breakdown which more than confirmed appellant's severe emotional problems and suicidal tendencies. (A. 75, 76) An extensive report from Springfield was before Judge Motley and the motion papers referred the Court to that report. Extensive psychiatric evaluations made only a few months before appellant's suicide attempt were also attached to the motion as Exhibits 2 and 3 (A. 81-85). These reports further detailed the extent of appellant's precarious condition. Exhibit 4 to the motion to reduce (A. 86-88) was the abstract of appellant's treatment at the very institution where he was brought immediately after his attempt to take his life. The final diagnosis contained in that abstract expressly concluded that appellant had taken an overdose of dalmane in a suicidal attempt and was suffering from a severe psychotic depressive reaction. (A. 88)

Notwithstanding the Government's contention to the contrary, appellant urges that he clearly asserted these facts to the Court below, but it had nevertheless erroneously relied upon false information in determining his sentence. In light of these facts and the uniform conclusions of all of the

examining psychiatrists, there was no credible basis for the Court's conclusion that appellant was a "faker," a characterization which no doubt materially affected Judge Motley's judgment in imposing sentence.

Similarly, the underlying motions are replete with proof of appellant's rehabilitation (A. 71-73, 104-106), introduced to rebut the erroneous speculation contained in the probation report prepared in 1971, from which Judge Motley quoted extensively at the time of sentencing. Appellant's rehabilitation could not have been more strongly confirmed by the Government's own admission in its memorandum in response to appellant's motion to reduce that "defendant Stein should receive favorable consideration for his apparently law abiding existence since 1972." (A. 98) The exhibits annexed to the motion to reconsider further pointed out that appellant had not continued to "act in a fraudulent and manipulative manner" as the Court below erroneously cited from the 1971 probation report but rather, had been truly rehabilitated. (A. 112-118) Thus, this issue, like the preceding ones, was fully presented in the motion papers.

II

THE COURT CLEARLY RELIED UPON MATERIAL MISINFORMATION IN SENTENCING APPELLANT

The Government would have this Court believe that,

solely because the Court referred to the seriousness of the crimes for which appellant was sentenced, it may not have relied upon the foregoing factual inaccuracies in determining or enhancing appellant's sentence.* This argument is belied by the sentence imposed upon the codefendants who were convicted of the same crimes. These codefendants, with one exception, all received suspended sentences. The one exception, Norman Rubinson, whom this Court only recently described as the "mastermind" of the criminal conspiracy, received but three years.** See U.S. v. Rubinson, _____F.2d_____ (2nd Cir. 1976) Slip Opinion p. 3119, 3123 (April 8, 1976).

---

* Although the Government also argues that the Court may have relied upon appellant's testimony regarding involvement in other securities violations, it should be emphasized that this testimony was freely offered pursuant to an agreement with the Government that appellant would plead guilty in the instant case to those counts selected by the Government, that he would cooperate fully in various investigations, and that he would testify at the trial of his codefendants, subjecting himself to cross-examination, including exposure of any and all prior misdeeds. In turn, it was agreed that appellant would not be punished for any of these other misdeeds. This agreement was fully detailed to Judge Motley at the time appellant pleaded guilty. (A. 28-29) To the extent that the Government argues that the Court relied upon appellant's testimony of other misconduct, we submit that such reliance would have been constitutionally improper. The Government promised appellant that he would not be punished for this full confession. Such a grant of immunity could not be subverted by the Court, a coordinate branch of the Government. If the Court did rely upon this testimony in reaching its decision as to the sentence to be imposed, such reliance in and of itself would constitute reversible error.

** Rubinson also had prior convictions. See pp.22-23 and 28, Minutes of Sentencing of Norman Rubinson under 74 CR 573 (both for perjury and securities violations), dated May 15, 1975.

The Court's reliance upon all of this misinformation could not be more apparent from the record. Judge Motley expressly stated her conclusions at the time of sentencing, that appellant was a "faker" and a "fixer" and read extensive portions of the out-of-date and inaccurate 1971 probation report.

III

IT IS CLEAR THAT THIS COURT HAS THE AUTHORITY TO GRANT THE RELIEF APPELLANT REQUESTS UNDER THE CIRCUMSTANCES HERE PRESENTED

This Court has jurisdiction on an appeal from the denial of a Rule 35 motion to vacate this sentence and remand the case for resentencing. In his motion below, appellant urged that the Court relied upon material misinformation in meting out its sentence. The mere fact that he did not label the issue as a "due process" claim cannot alter the reality that he fully apprised the Court of the factual predicate for the illegality of the sentence. See United States v. Slutsky, 514 F.2d 1222, 1229 (2d Cir. 1975); United States v. Velazguez, 482 F.2d 139, 142 (2d Cir. 1973); and United States v Stumph 476 F.2d 945, 947 (4th Cir. 1973).

Under similar circumstances, the Court in U.S. v Looney, 501 F.2d 1039 (4th Cir. 1974) held that the case of a defendant, where sentence was predicated upon misinformation,

must be remanded to a different district judge for resentencing. The Court stated that:

> Since the error was one created by the district judge, we think that the appearance of justice, as a minimum, requires that resentencing be before another district judge. 501 F.2d at 1042

We submit that in a case in which the Court (a) twice ignored substantial evidence in support of appellant's position; (b) reached out to credit unsubstantiated side allegations; (c) refused requests for oral argument or a fair hearing on these matters after appellant demonstrated the falsity of the factors upon which the Court obviously relied; and (d) refused to reduce appellant's maximum and disparate sentence despite the Government's firm recommendations in that regard, the Court below has made it clear that it is not interested in the valid arguments raised by appellant.

Accordingly, the fair administration of justice demands that resentencing take place before a different District Court judge.

CONCLUSION

FOR THE FOREGOING REASONS, AND THE REASONS STATED IN APPELLANT'S MAIN BRIEF, THE SENTENCE SHOULD BE VACATED AND THE CASE REMANDED FOR RESENTENCING BEFORE ANOTHER DISTRICT COURT JUDGE.

Respectfully submitted,

PHILLIPS, NIZER, BENJAMIN, KRIM
& BALLON
40 West 57th Street
New York, New York 10019
(212) 977-9700

Of Counsel:

Louis Nizer
Angelo T. Cometa
Perry Galler
Jonathon D. Warner